Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-1951

KENNETH W. PUCKETT,

Petitioner,

vs.

PAULDING COUNTY, GEORGIA
BY ITS BOARD OF COMMISSIONERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PAULDING COUNTY, GEORGIA
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Kenneth W. Puckett petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Georgia entered in the case of *Puckett v. Paulding County,* No. 35503, 245 Ga. 439 (S.E.2d), Petitioner being the appellant below. The judgment was rendered on the 29th day of February, 1980, and a Motion for Rehearing was denied on March 13, 1980. A stay of the remittitur was granted for 90 days from March 13, 1980, and until the petition to the Supreme Court is finally

disposed of, the same reading as follows:

"Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on February 29, 1980, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

/s/ Harold N. Hill, Jr.
Justice"

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Georgia has been reported, and is appended hereto. In addition, for further clarification, the order appealed from the lower court is also appended, as is the order of the Supreme Court denying Petitioner's Motion for Rehearing.

JURISDICTION

The judgment of the Supreme Court affirmed the lower court, and the Motion for Rehearing thereof was denied as shown above. The statutory provision which is believed and contended to confer jurisdiction on this Court to review the judgment by certiorari is 28 U.S.C. Section 1257(3), since a right, privilege and immunity is specially claimed under the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Is the legislative zoning classification here in question which seeks to limit or regulate the Appellant's access to his common occupation of life as an auto salvage dealer, subject to strict scrutiny by the Courts?

2. If the zoning regulation is directed at a protected liberty interest, to-wit: the pursuit of a common occupation of life, upon whom does the burden rest to sustain or discredit the regulation?

3. Does the zoning regulation adopted in the within case—which infringes upon fundamental constitutional rights—abort the traditional presumption in favor of the validity of legislative enactments?

4. Is the zoning classification in the within case, denying Petitioner's use, but extending his competitors identical use, invalid as in excess of the police power, since the same bears no rational relationship to the health, welfare, morals or safety of Paulding County?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner, Kenneth W. Puckett, controls more than five acres of land in the R-2 Zoning District in Paulding County. Pursuant to his written application to use the property as an automobile salvage yard, the Planning Commission approved his operation as a "Special Provision" under Article 8 of the Paulding County Zoning Ordinance, and the Zoning Board of Appeals of Paulding County also approved the application. However, the Board of Commissioners of Paulding County, treating the application as one to rezone, rejected the application and declined to rezone the property.

The actions of the Planning Commission and the Paulding County Zoning Board of Appeals followed public hearings, while the Chairman of the County Commission, HENRY A. WINN, admitted upon trial the decision of the Commission was not based upon any evidence—of such relevant factors as changes in traffic flow and density, the

geographical location of the property, or topography of the property,—but merely upon a feeling that "there were already enough junkyards in the county."

The evidence also showed that the Paulding County Commission, contemporaneously with rejecting Mr. Puckett's application, approved an additional fifty-six acres for special use as requested by a competitor of Mr. Puckett's, in the same land lot, *directly across* Highway 92 from Mr. Puckett's property. This application was *identical* to Mr. Puckett's except that Mr. Puckett sought approval for approximately one-fourth as much property.

Commissioner Winn, the only witness for the County, sought to expalin this gross inequality of treatment by claiming that the property approved for an auto recycling center for Mr. Puckett's competitor was a "grandfather use". The transparency of this distinction is demonstrated, however, in view of evidence that fifty-six acres of the competitor's property were acquired *subsequently to the enactment of the alleged comprehensive zoning ordinance,* and was acquired from parties who had never utilized the property as an automobile salvage yard.

Commissioner Winn contended that neither the application of Mr. Puckett's competitor nor the application of Mr. Puckett should have been granted.

There was no further effort on the part of Paulding County to explain the rational basis of the decision to treat Mr. Puckett differently from his competitor, Auto Parts Wholesale, Inc.

Mr. Puckett presented evidence at the hearing on the injunction that he was engaged in the auto salvage business in Cobb County and had been so engaged for approximately fifteen years, and desired to expand his operations into adjacent Paulding County. Evidence further showed that

Auto Parts Wholesale, Inc. had been engaged in the same business for at least ten years in Paulding County. Puckett's evidence further showed that exhaustive investigation, including public hearings upon the application by the Planning Commission and the Board of Zoning Appeals of Paulding County had both resulted in *unanimous* approval of the requested use.

In the face of this compelling evidence the Commission Chairman who testified claimed that the Commissioners had no evidence upon which to base a denial except that it might affect surrounding property values, and that they "didn't need any evidence."

While Mr. Puckett presented no expert testimony concerning comparative land value—since such evidence was not considered pivotal where no outright taking or condemnation was asserted—the clear result of the denial of the use sought by Mr. Puckett was to deny him the ability to engage in his profession on the most appropriate site available to him.

Additionally, as far as property value is concerned, it is patent that Mr. Puckett's property would have a greatly reduced value as *residential* property located directly across the road from a massive sixty-six acre auto junk yard (ironically approved for Mr. Puckett's competitor, Auto Parks Wholesale, Inc.). Mr. Puckett has shown detrimental effect of the denial of his requested use.

He has shown that the Zoning is not substantially related to the public interest. Mr. Puckett, in an attempt to decipher the unannounced reasons of the Commission for denying his request, examined the Chairman of the Commission at length concerning the motives of the Commission which might have addressed some public interest. Excerpts from that examination follow:

Adams: "But what other study or what other evidence was presented at the hearing on August the 22nd, 1978 before the commission that would have authorized you to reject the two studies of the planning commission and the Zoning Board of Appeals which was based on evidence?

* * *

Q. What evidence was—had been presented to the County Commissioners, the three County Commissioners, who considered Mr. Puckett's application on the 22nd of August, 1978? What evidence did you consider?

A. The location of the property was the main reason that it was turned down.

Q. What was it about the location of the property?

A. The property was too valuable a portion of the county to turn into an auto salvage yard.

Q. What do you mean by—

A. It's residential.

* * *

Q. But did you have any evidence before you that it would reduce the value of the property?

A. We didn't need any evidence.

Q. Didn't need any evidence?

All right.

Did you have a—was there any study of the topography?

A. None whatsoever.

Q. Was there any impact statements from the Paulding County Police Department involving the fact that it would increase the traffic flow or traffic density or any evidence of that nature?

A. No.

Q. No evidence from the county engineering department?

A. No.

Q. And nothing from the Board of Education indicating what impact it would have on education in the county or anything like that.

A. No.

Q. The only other evidence then, other than your speculation as to the value of the property and the fact that it is too valuable a part of the county then, was the evidence presented to you by the planning commission and the Zoning Board of Appeals which both unanimously approved the proposed use of the property."

The transparency of Commissioner Winn's contention that residential property values might be adversely affected is readily discernible when it is observed that the Commission contemporaneously approved *fifty-six "non-grandfather" acres* across the street from Mr. Puckett's fifteen acres for Mr. Puckett's competitor. Mr. Puckett's fifteen acre use could not reasonably be expected to adversely affect property values while his competitor's fifty-six acre use had no such effect. The Commission clearly did not legitimately consider this to be a governing public interest. No other effort was made to explain the rational basis of the decision to treat Mr. Puckett differently from his competitor, Auto Parts Wholesale, Inc.

The only rational conclusion that could be drawn from Commissioiner Winn's testimony and the gross disparity of the results of the two applications was that the Commission abused the zoning power entrusted to them for the prohibited purpose of protecting the local establishment from undesired competition from an out-of-county business operated by Mr. Puckett.

The trial court on June 14, 1979, entered an order granting Paulding County's application for a preliminary

injunctioin against Mr. Puckett's use of the property as an auto recycling center. A notice of appeal to the Supreme Court of Georgia was filed on July 13, 1979. The case was argued orally on October 10, 1979. The Supreme Court of Georgia on February 29, 1980, rendered its opinion affirming the trial court.

On March 7, 1980, counsel for Petitioner filed a Motion for Rehearing in the Supreme Court of Georgia, which Motion was denied on March 13, 1980; however, the Supreme Court of Georgia granted a 90 day stay of the remittitur, pending application for Writ of Certiorari to the Supreme Court of the United States.

The Petitioner raised the issues here presented by answer to the County's application for injunctive relief (copy of which is appended hereto). The Constitutional issue of denial of equal protection was urged throughout the trial and throughout the Appellate decision in the Supreme Court of Georgia.

The same constitutional issue is presented here for review.

MANNER OF RAISING FEDERAL QUESTIONS

The petition alleges that the action of Paulding County, a political subdivision of the State of Georgia, violated the Petitioner's right to equal protection of the laws as framed in the Fourteenth Amendment of the Federal Constitution. These contentions were raised at the first opportunity by Petitioner in his answer to Paulding County's initial complaint for injunction. (See FOURTH DEFENSE and FIFTH DEFENSE in Petitioner's answer appended hereto.) The ruling of the trial court was that the actions complained of did not violate the constitutional provisions

cited. The Supreme Court of Georgia affirmed, and the Motion for Rehearing pointed out each and every misconstruction, misinterpretation and error made by such Court, including its denial of rights, privileges and immunities granted to Petitioner by the Federal Constitution.

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT

A.

THE PRESUMPTION OF VALIDITY OF LEGISLATIVE ENACTMENTS SHOULD BE IGNORED WHERE FUNDAMENTAL CONSTITUTIONAL RIGHTS ARE AFFECTED.

Appellant acknowledges that deference to local control of zoning matters has ample precedent. In 1926, the United States Supreme Court indicated in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that a zoning measure would be constitutional so long as it was substantially related to public health, safety, morals, or general welfare. This view is still the law, although it has been broadened to some extent.

The Court has been reluctant to hold as a matter of federal constitutional law that a zoning measure exceeds the broad police power of the States. Thus the primary responsibility for defining the legitimate ends of zoning has been left to state courts.

The Georgia courts for many years abdicated their responsibility to review zoning decisions of legislative bodies claiming that substantive zoning decisions should be left to the wisdom of governing authorities of counties and municipalities.

This philosophy remained intact until approximately five years ago, when the Georgia Supreme Court's decision in *Barrett v. Hamby,* 235 Ga. 262, S.E.2d 399 (1975) opened the courthouse doors to constitutional review of local zoning rulings. The philosophy of judicial non-intervention into zoning matters has been replaced by a policy of active judicial review.

In *Barrett v. Hamby,* the Georgia Supreme Court examined the relationship between private property rights and the use of the police power to protect the public welfare through zoning. In that case, a landowner applied to rezone property in Cobb County on which he sought to build a shopping center. The land was zoned at the time for single family houses on half-acre lots. The Cobb County Board of Commissioners denied the application primarily on the basis of existing land use plan that the Commissioners believed provided sufficient land for commercial development in the area.

In announcing abandonment of its policy of deference, the Georgia Supreme Court indicated that zoning is subject to judicial review under the constitutional prohibition against taking private property without just compensation. The Court restated the historic conflict: "As the individual's right to unfettered use of his property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare."

Applying a balancing test, the Court did not hold that the zoning regulation had to render the owner's property totally useless in order to be found an improper taking. Instead it indicated that if the zoning resulted in relatively little benefit to the public while inflicting serious economic injury

on the property owner, the Court would declare the zoning decision void as confiscatory.

Numerous Georgia cases[1] sought retrenchment from the Georgia Supreme Court's modern activist approach to zoning cases and return to the traditional rule of affirming any zoning decision where there was "any evidence" to support the legislative board's decision. However, the *Barrett v. Hamby* doctrine which relied substantially upon this Court's decision in *Nectow v. City of Cambridge, et al.*, 277 U.S. 183, was adhered to and the Georgia courts continued to hold that where prima facie discrimination or property infringement was shown the burden rested upon the governing authority to justify its action as bearing a substantial relationship to the public health, safety, morality or general welfare.[2]

---

[1]*Guhl v. Holcomb Bridge Road Corp.*, 238 Ga. 322 (232 S.E.2d 830) (1977); *Ruff v. City of Smyrna*, 240 Ga. 250 (240 S.E.2d 19) (1977); *Barrett v. Hal W. Lamb & Associates, Inc.*, 243 Ga. 567 (255 S.E.2d 61) (1979); *DeKalb County v. Flynn*, 243 Ga. 679 (256 S.E.2d 362) (1979). The Court in *Flynn* clearly rejected the county's contention that the courts ought to affirm any zoning decision of the county if there is any evidence to support it. Instead, the Court adhered to the basic philosophy first expressed in *Barrett v. Hamby*, that the burden shifts to the county to justify the zoning once a landowner has carried the initial burden of showing that the zoning is significantly detrimental to him and is insubstantially related to *governing public interests.*

[2]The *Hamby* decision had addressed the definition of welfare in a manner remarkably adjusted to the facts of the within case as follows: "As we consider [the contended] 'welfare,' we find merely the board's policy determination that the county already has enough commercially zoned property. Such an attempted justification, though it is relevant (see Code Ann §69-802), cannot alone suffice; it completely fails to scrutinize the merits of the land in question and the impact of the decision upon the landowner's property rights." 235 Ga. at 266.

Suddenly, however, in the within case, the *Hamby* philosophy was abandoned and the Supreme Court of Georgia, reverting to pre-Hamby authority inexplicably declared:

> "It was not necessary for the county commissioners to justify their decision denying a zoning change; it was necessary for the landowner to demonstrate that the decision was invalid, which he did not do on this record." (245 Ga. 439, 440).

As to equal protection, the evidence in the present case shows without question that considering all the criteria to be taken into consideration, Mr. Puckett was in all respects similarly situated to the other salvage yard for which a rezoning was granted. Although Mr. Puckett is not a member of a class based upon race, sex, age and others already recognized by this Court with respect to which classifications of law and ordinances are inherently suspect, he is entitled to protection of the laws equal to that afforded to persons similarly situated. *Stanley v. Illinois,* 405 U.S. 645 (1972).

Additionally, since the Commissioners have utilized the ordinance in the present case to regulate Mr. Puckett's entry into competition in Paulding County with his competitor, Auto Parts Wholesale, Inc., Mr. Puckett contends that rigid scrutiny of the zoning authority's land use regulation is appropriate.

Mr. Puckett contends that since the classification or regulation here in questions seeks to restrict his access to his common occupation of life as an auto salvage dealer, strict scrutiny of the classification as applied in *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972), should be invoked. Such rigid scrutiny would place the burden of proof upon the governing authority in cases

where such infringement is prima facie shown.

In *Roth,* this Court held:

" 'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (Frankfurter, J., dissenting). . . . 'While this court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freeedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, *e.g.,* Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694, 98 L.Ed. 884; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551." (Emphasis supplied.)

Justice Marshall's dissent in *Roth* was also instructive upon the constitutional magnitude of the right to engage in business without irrational or unreasonable governmental interference.

"This Court has long maintained that 'the right to work

> for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.' Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Hughes, J.). See also Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923)."

From the time of *Euclid* and *Nectow,* forward, the Supreme Court has been reluctant to review the substance and application of land use regulations. Recently, however, this Court reviewed a zoning regulation which was so designed as to intrude upon fundamental liberties, and struck down the regulation. In *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, this Court held:

> "When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate. 'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' . . . when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. . . .
>
> " '[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary

> impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.' *Poe v. Ullman,* supra, 367 U.S., at 542-543, 81 S.Ct., at 1776-1777 (dissenting opinion)."

The extension of this Court's recognition of the "protected liberty" of family associations in *Moore v. City of East Cleveland* is appropriate in this case since it involves a "protected liberty" of engaging in a common occupation of life.

Such an extension of the protected liberty interest concept would result in placing upon the governing authority exercising police powers the burden of justifying their actions, a burden that clearly was not carried in the within case.

B.

EQUAL PROTECTION UNDER TRADITIONAL BURDEN OF PROOF STANDARDS

Assuming that the burden remains upon the Petitioner in the within case, the record abounds with evidence which mandates a finding that the local governing authority abused its police power in the within case. Such caprice on the part of land use regulators has been remedied by this Court in the past, even under more traditional burden of proof standards.

Justice Sutherland, writing for a unanimous court, in *Nectow v. City of Cambridge, et al.,* 277 U.S. 183, observed:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Euclid v. Ambler Co., supra, p. 395 (47 S.Ct. 114). Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of face, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained."

As in *Nectow,* an appropriate investigation had been made and a report filed showing that Mr. Puckett's rezoning request was desirable and compatible with the public welfare. Two separate bodies, the Planning Commission and the Zoning Board of Appeals had approved the requested zoning after investigation and public hearings. The Board of Commissioners capriciously rejected their evidentary findings without any additional evidence and without even viewing the property. Such unbounded discretion is untenable and the exercise of such unbridled power cannot be sustained.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,

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APPENDIX

In the Supreme Court
of Georgia

Decided:
Feb 29, 1980

35503. PUCKETT v. PAULDING COUNTY.

HILL, Justice.

This is a zoning case of sorts, but not a typical zoning case. Here the county is the plaintiff and the landowner is the defendant. The county sued the landowner to enjoin him from using his property, zoned R-2 (suburban residential), as an automobile salvage yard. The court granted the injunction and the landowner appeals.

Defendant owns 4 acres and has an option to purchase 11 adjacent acres, all zoned R-2 (suburban residential) since enactment of the Paulding County zoning ordinance in 1969. Defendant applied to the Paulding County planning commission to "Rezone under special provisions." The commission treated the application as a "rezoning" application and approved it unanimously, as did the zoning board of appeals (although the latter body may have treated the application as seeking a permit rather than rezoning).

The Board of Commissioners of Paulding County rejected the rezoning. At that same meeting the Board approved a rezoning request of Auto Parts Wholesale, Inc., on 66 acres diagonally across Highway spur 92 from defendant's property. This request was granted on the basis that this salvage yard had been in operation prior to the zoning ordinance.

Notwithstanding the denial of his application, defendant commenced operating an auto salvage yard on his property and this litigation was commenced by the county.[1]

1. The defendant argues that the Paulding County zoning ordinance should be construed so as to allow the zoning board of appeals to authorize conditional use or special zoning permits.[2] It does authorize that board to issue permits as to such things as airports, race tracks and manufacture of such things as acid, asphalt, brick, cement, explosives, fertilizer and petroleum. However, automobile salvage or parts yards, as well as junk yards of any kind, and building material and other types of storage yards, can only be operated on property zoned R-1, rural (all uses permitted), or I-1 general industrial which permits all manufacturing, wholesale or storage uses not listed as conditional uses (airports, etc., above).

The landowner needed a change in zoning, not merely a permit, to operate an auto salvage yard on his property. Hence the approval of his application by the Paulding County zoning board of appeals was not the final authority he needed. It was not illegal for the Paulding County commissioners to consider his application.

2. The landowner does not contend that he established a denial of his property rights under *Barrett v. Hamby,* 235

[1]We cannot approve of a property owner, dissatisfied by a zoning decision, who violates the zoning ordinance rather than challenging the decision in court. Whether such conduct could deprive the landowner of the right to defend by challenging the ordinance when the county seeks to enforce it, we do not decide in this case.

[2]For the difference between "special zoning permits" and "conditional use permits", see *Martin Marietta Corp. v. Macon-Bibb County Planning & Zoning Commission,* 235 Ga. 689 (221 SE2d 401) (1975). Whether this difference is recognized in the Paulding County zoning ordinance, we are not here called upon to decide.

Ga. 262 (219 SE2d 399) (1975), and its progeny. He asserts a denial of equal protection in the allowance of his neighbor's use of its property for auto salvage yard purposes. The neighbor had a pre-existing nonconforming use and this fact alone prevents these landowners from being similarly situated.[3] Other than this difference in treatment, this landowner has shown no violation of his constitutional rights. It was not necessary for the county commissioners to justify their decisioin denying a zoning change; it was necessary for the landowner to demonstrate that the decision was invalid, which he did not do on this record. *Matthews v. Fayette County,* 233 Ga. 220, 225-226 (210 SE2d 758) (1974).

Judgment affirmed. All the Justices concur.

---

[3]The grant of one zoning application and the denial of another, even where the owners are similarly situated, would not necessarily show a violation of the rights of the one whose application was denied.

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA MAR 13 1980

The motion for a rehearing was denied today: Case No. 35503. Puckett v. Paulding County, Georgia

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF PAULDING, STATE OF GEORGIA

PAULDING COUNTY, GEORGIA By its Board of Commissioners, Plaintiff,	)	CIVIL ACTION FILE NO. 8617
vs.	)	
KENNETH W. PUCKETT, Defendant.	)	

ORDER

The above captioned case having come on for hearing before the Court on May 7, 1979 on Plaintiff's prayer for

Declaratory Judgment and Injunctive Relief. After hearing evidence, argument of counsel, and reviewing the pleadings, briefs and other pertinent parts of the record, the Court adopts the stipulations of facts submitted by the parties May 3, 1979 and concludes as a matter of law the following:

The Defendant contends that he is seeking a special use permit which does not require a zoning change. However, the Zoning Ordinance stipulated into evidence does not provide for or define a "special use". In fact, while the Ordinance contains a number of definitions, ten relating to auto salvage and junk yards, it does not define such things as conditional and obnoxious uses which would be helpful in understanding this case. The closest would be Article VIII captioned "Special Provisions". Section A of this article sets out certain uses which are declared "obnoxious". Section B sets out certain uses which may be permitted in any zoning district that appear to be conditional uses for public convenience or welfare. Both Sections A and B require authorization from the Zoning Board of Appeals after study and recommendation by the Planning Commission before a permit can issue. Section C merely sets out the regulations for group housing projects. Section D merely sets out the regulations for junk and salvage yards and similar operations.

Defendant's application is for an auto recycling center which appears to fit the definition of "auto salvage" under Article II of the Zoning Ordinance. This is not one of the permitted uses in an R-2 District as the subject property is presently zoned. All uses are permitted under R-1 except certain defined obnoxious uses. Manufacturing or storage uses are allowed under I-1 except conditional uses as set out in Article VIII. The only defined obnoxious uses set out

in the ordinance appear in Article VIII, Section A. A conditional use permit is generally defined as one granted in any zoning district for public or quasi-public purposes rather than hardship, 101 C.J.S. Zoning §274 at p. 1039. The only conditional uses defined in the Ordinance are set out in Article VIII, Section B.

Thus, the only way the Defendant's use can be permitted is by a change in zoning to R-1 or I-1. Any action by the Zoning Board of Appeals in this case is a mere nullity as its approval is only required for obnoxious uses and conditional uses as set out in Article VIII, Sections A and B. The Zoning Board of Appeals cannot review a recommended zoning change by the Planning Commission, *Royal Atlanta Development Corp. v. Staffieri,* 236 Ga. 143 (1976). Only the Planning Commission can recommend zoning changes and the ultimate authority to grant such a change rests exclusively with the governing authority, *River Hill Community Assoc. v. Cobb Co. Board of Commissioners,* 236 Ga. 856 (1976).

Defendant has failed to carry the burden of producing sufficient evidence to justify that the withholding of a permit would be as a matter of law arbitrary and unreasonable. The only evidence merely indicates a nearby existing auto salvage yard was allowed to expand its operation. Since the other salvage yard is not a party to this litigation, the Court declines to comment on the fact that an auto salvage yard is not permitted use in a R-2 zoning district.

It is HEREBY ORDERED, ADJUDGED and DECLARED, that Defendant does not have the right to establish an auto salvage yard in an R-2 zoning district, and he is hereby enjoined and restrained from operating an auto salvage yard on subject property until such time as he

obtains a change in zoning to an appropriate designation for such use.

SO ORDERED, this 14th day of June, 1979.

/s/ Arthur W. Fudger,
ARTHUR W. FUDGER,
Judge Superior Court
Paulding County, Georgia

IN THE SUPERIOR COURT OF PAULDING COUNTY, STATE OF GEORGIA

PAULDING COUNTY, GEORGIA By Its Board of Commissioners, Plaintiff,	)	CIVIL ACTION FILE NO. 8617
vs.	)	
KENNETH W. PUCKETT, Defendant.	)	ANSWER

Comes now, KENNETH W. PUCKETT, defendant in the above styled action, and files this his Answer, and shows to the Court the following facts:

FIRST DEFENSE

Count I of Plaintiff's complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Answering each separate paragraph of Count I of Plaintiff's complaint, defendant shows to the Court the following:

1.

Paragraphs 1, 2, 4 and 7 of Plaintiff's complaint are admitted.

2.

Paragraphs 3, 5, 9 and 10 of Plaintiff's complaint are denied.

3.

Paragraph 6 of Plaintiff's complaint is admitted, except so much of said paragraph alleges that Exhibit "B" to Plaintiff's complaint is an application to rezone; but defendant admits that said Exhibit is an application for special use under Article VIII of the Paulding County Zoning Ordinance.

THIRD DEFENSE

For a third defense, defendant shows the Court as follows:

1.

On June 30, 1978, KENNETH W. PUCKETT applied for authorization under Article VIII of the Paulding County Zoning Ordinance to utilize the real property set

forth in Exhibit "A" attached hereto, as an automobile salvage yard.

2.

On August 3, 1978, the application was duly presented to the Paulding County Planning Commission.

3.

After due consideration of the application, the Planning Commission, by unanimous vote, recommended approval for the requested zoning classification change, and authorization for use under Article VIII.

4.

On August 17, 1978, the application for authorization as aforesaid was presented to the Zoning Board of Appeals of Paulding County and the said application was unanimously approved by that body.

5.

On August 22, 1978, the said application for authorization was presented to the Paulding County Board of Commissioners at their regular meeting.

6.

The Board of Commissioners, after one of its members had voiced approval of the change and another of its members had stated that he personally felt that there were already sufficient auto salvage operations in the county, arbitrarily and without reason cast a two (2) to one (1) vote to reject the requested zoning change and authorization for use under Article VIII.

7.

The special use under Article VIII of the Paulding County Zoning Ordinance is within the original jurisdiction of the Paulding County Zoning Board of Appeals.

8.

There is no provision in Article VIII of said ordinance for consideration or appeal of a decision of the Zoning Board of Appeals to the Board of Commissioners.

9.

The decision of the Paulding County Zoning Board of Appeals upon the defendant's application for special use is a final legislative act, not subject to review by the Board of Commissioners of Paulding County.

10.

The decision of the Board of Commissioners of Paulding County upon the application of the Defendant for special use under Article VIII of the Paulding County Zoning Ordinance is therefore unlawful, null and void.

FOURTH DEFENSE

For a fourth defense, defendant realleges and incorporates paragraphs one (1) through six (6) as set forth in the Third Defense above and further shows the Court:

11.

Contemporaneously with the consideration of the application of the Defendant as above set forth the Paulding

County Planning Commission and Paulding County Zoning Board of Appeals considered and approved an identical application of Auto Parts Wholesale, Inc., for use as an auto salvage yard under Article VIII, approximately 66 acres located directly across the highway from the property sought for approval by the Defendant.

12.

The Board of Commissioners of Paulding County approved the application of Auto Parts Wholesale, Inc., on the 22nd day of August, 1978, while rejecting the application of the defendant for the same use.

13.

The said action by the Board of Commissioners of Paulding County denies this Defendant equal protection under the law, in violation of Article I, Section II, Paragraph II of the Constitution of the State of Georgia of 1976 (Code Ann. Section 2-203) and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States (Code Ann. Section 1-815).

FIFTH DEFENSE

For a fifth defense, defendant realleges and incorporates paragraphs one (1) through six (6) as set forth in the Third Defense above, and further shows the Court:

14.

The zoning ordinance of Paulding County which placed said property in the zoning classification, as applied to the

said property set forth in Exhibit "A" attached hereto, is unconstitutional, null and void, in that it prohibits the use of said property for the only use for which the property is reasonably and economically suited, to wit: Commercial use, and has the effect of freezing the said property in its present undeveloped condition and thus, the application of the zoning restrictions to the said property is the equivalent of the complete destructioin of the Defendant's valuable property rights in the said property without the prior payment of just compensation therefor, since the said property is unsuited for residential purposes, in violation of Article I, Section I, Paragraph I of the Constitution of the State of Georgia of 1976 (Code Ann. Section 2-101) and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States (Code Ann. Section 1-815).

15.

The rejection of the application for authorization for special use under Article VIII was so arbitrary and unreasonable as to result in a confiscation of the property without just compensation.

16.

The action of the Paulding County Board of Commissioners as alleged in paragraph seven (7) and eight (8) was null and void for the reason that the said action was taken without notice to the Defendant herein and without prior opportunity of hearing the defendant upon said application in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States (Code Ann. Section 2-815) and Article I, Section I, Paragraph I of the Constitution of Georgia of 1976 (Code Ann. Section 2-101).

Wherefore, Defendant demands that the prayers of Plaintiff's Complaint be denied, that Plaintiff's Complaint be dismissed and such other relief as may be proper in the premises.

SAMS, GLOVER & GENTRY

By: /s/ A. Harris Adams
A. HARRIS ADAMS
Attorney for Defendant

222 Washington Avenue
Marietta, GA 30060
(404) 422-6502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

KENNETH W. PUCKETT,

Petitioner,

vs.

PAULDING COUNTY, GEORGIA
BY ITS BOARD OF COMMISSIONERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Georgia were mailed, postage paid, this _____ day of June, 1980, as follows:

Mr. Thomas C. Sanders
Lane & Sanders
215 Main Street
Dallas, Georgia 30132

A. HARRIS ADAMS
223 Washington Avenue
Marietta, Georgia 30060
Attorney for Petitioner